No. 11904.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Ernest D. Heaton, Executor of the Last Will of Fred W. Heaton, Deceased and Myra C. Knapp, Executrix of the Last Will of Daniel A. Knapp, Deceased,

Appellants,

vs.

John N. Hoffman, Trustee of the Estate of Melaine Douglas Wood, Bankrupt,

Appellee.

APPELLANTS' OPENING BRIEF.

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EDNA D. HEATH, Executrix of the Last Will of FRED W. HEATH, Deceased, and MYRA C. KNAPP, Executrix of the Last Will of DANIEL A. KNAPP, Deceased,

Appellants,

vs.

JOHN N. HELMICK, Trustee of the Estate of MELAINE DOUILLARD WOODD, Bankrupt,

Appellee.

APPELLANTS' OPENING BRIEF.

This is an appeal by the estates of the late Fred W. Heath and the late Daniel A. Knapp from an order and judgment of the District Court entered on December 2, 1947, affirming the order of the Referee in the pending bankruptcy proceeding of Melanie Douillard Woodd, which decreed that a certain piece of real estate in Los Angeles, California, which is identified in the record as the Virginia Avenue property was an asset of the bankruptcy estate on the date of the filing of the bankruptcy petition, and that appellants, or their testates, had no interest therein. [R. pp. 57-62, 83.]

I.

Jurisdiction.

Melanie Douillard Woodd (herein referred to as Woodd) was adjudicated a bankrupt on August 29, 1945. The controversy herein is solely between the trustee in bankruptcy and the appellants, and the subject matter of the controversy is the ownership of the Virginia Avenue property, and also appellants' legal right to the proceeds of another piece of property which is identified in the record as the Glendale property.

The appellate jurisdiction of this court is under Section 24 of the Bankruptcy Act. The amount involved herein is in excess of $500.00.

II.

Real Parties in Interest.

The bankrupt is not a party to this appeal.

The sole creditors of said bankrupt are Emile A. Douillard, Frank T. Douillard, Raymond F. Puissegur, and Juliette Evans [R. pp. 6-21, incl.], and their claims are based on a judgment obtained by them against Woodd on April 25, 1940, in the Superior Court of Los Angeles County, California, in cause No. 435718. [Ex. A, R. p. 10.] Said judgment was affirmed by the California Supreme Court on August 3, 1942. (*Douillard v. Woodd*, 20 Cal. 2d 665.)

Insofar as the appellants are concerned, the controversy between them and said creditors, as bearing on some of the controlling issues herein, was determined adversely to said creditors by the State Court in *Douillard v. Smith*, 70 Cal. App. 2d 522.

III.

Nature of Controversy.

The controversy herein between the appellants and the trustee in bankruptcy relates to the Virginia Avenue property and the Glendale property.

A.

Virginia Avenue Property.

This property was purchased by M. L. Hovey in trust for Fred W. Heath and Daniel A. Knapp at an execution sale on *April 12, 1943,* and it was based on a judgment recovered by them (in the name of Hovey) as plaintiff in the Superior Court of Los Angeles County in action No. 450821 against the bankrupt on July 8, 1941, in the sum of $4000.00 and costs. The sale not having been redeemed, a Sheriff's deed for said property was given to Hovey in trust for Fred W. Heath and Daniel A. Knapp on *April 18, 1944.* Since that time, Fred W. Heath and Daniel A. Knapp have remained the unconditional owners of said property. (See Sheriff's deed attached to Amended Record.)

B.

Glendale Property.

The Glendale property was also purchased by Hovey in trust for Heath and Knapp at a Sheriff's sale held *September 8, 1942,* and it was based on the same judgment. Said sale not having been redeemed, a Sheriff's deed to said Glendale property was given to Hovey in trust for Heath and Knapp on April 18, 1944. (See Sheriff's deed attached to Amended Record.)

The Glendale property was sold by Heath and Knapp in January, 1946, and the net amount realized thereon was $2400.00.

In an action filed by Emile A. Douillard, one of the creditors herein, in the Superior Court of Los Angeles County against Heath and Knapp and others, said Heath and Knapp judgment and the sale of the Glendale property thereunder were attacked as fraudulent and void on the same grounds as were asserted by them in this proceeding. (*Douillard v. Smith, et al.,* 70 Cal. App. 2d 522.) The decision was in favor of Heath and Knapp. The court ruled that Heath and Knapp were not guilty of any fraud or conspiracy, and that their aforesaid judgment was valid, that their aforesaid purchase at said Sheriff's sale was valid, and that they had good legal title thereto. [See also Ex. 1, R. pp. 118-123.]

Said suit by Emile A. Douillard was brought in behalf of himself and the other creditors herein, as impliedly found by the Referee [R. p. 59; last four lines of Para. IV.]

Fred W. Heath, who had previously represented Woodd for many years, and who was also her attorney in said litigation, was well familiar with all of the facts surrounding the transaction [R. pp. 311, 319, 320, 411, 434] and he testified thereto at the trial in the *Douillard v. Smith* case. His testimony is recited on page 526 of the court's opinion.

Daniel A. Knapp, on the other hand, was not so familiar with the transaction, as he acted only as associate counsel with Heath in said litigation.

Fred W. Heath died *Sept. 8, 1945.* The instant action against his estate and Daniel A. Knapp was not launched *until December 3, 1946.*

IV.

Pleadings Re Heath and Knapp Controversy.

On *December 31, 1946,* a petition was presented by the trustee to the Referee, in which it was alleged *in general language and upon information and belief* that the Heath estate and Knapp claimed an interest in the Virginia Avenue property, but that their claim was void. Based upon said petition, an order to show cause was issued on December 31, 1946, directing the Heath estate and Knapp and other parties therein named to defend their title to said Virginia Avenue property. The order to show cause was returnable January 20, 1947. [R. pp. 26-28.]

The answer to said petition and order to show cause was filed January 16, 1947. In their said answer, Heath and Knapp alleged, in detail, the source and origin of their titles to the Virginia Avenue and Glendale properties, and made specific reference to their aforesaid judgment against Woodd of July 8, 1941, in action No. 450821, and to the aforesaid Sheriff's sales made pursuant to and under said judgment. [R. p. 29-37.]

V.

Referee's Findings. [R. pp. 57-62.]

The Referee's first impressions (see his Memorandum opinion [R. 38-55]) were that Heath and Knapp's aforesaid judgment against Woodd and the Sheriff's sales thereunder were had under suspicious circumstances. Said impressions were all eliminated in his Findings. Instead, the validity of their said judgment and of the Sheriff's sales based thereon was recognized in said Findings [R. pp. 57-59], and there is no finding, either express or

implied, that said judgment and sales were either fraudulent or invalid. Further, there is an express reference in the Findings to the *Douillard v. Smith* case [see Finding IV, last four lines on p. 59 of the Record], wherein said judgment and the Glendale property sale were upheld.

The basis of the trustee's case against the appellants, according to said Findings, rests solely *on contract.* [See Finding V, R. pp. 59-60.]

The Referee found: (a) that an *agreement* was made by Heath and Knapp to reconvey the Virginia Avenue property to Woodd as, if and when their judgment was paid; (b) that said *agreement* was made "Sometime *after* the Sheriff's sale (April, 1943) and prior to the filing of the voluntary petition herein" (August 29, 1945); (c) that said judgment was thereafter paid pursuant to said *agreement,* (d) that it was paid "before the filing of the voluntary petition," (e) that *under the agreement,* said reconveyance was to be made not "until she (Woodd) should secure her discharge in bankruptcy and the estate should be closed," and (f) that said agreement was secret.

The Referee further found [R. pp. 60-61] that the Virginia Avenue property was reconveyed by Hovey to Wood's nephew on September 11, 1946; that thereupon same was reconveyed by him to Woodd, and that Hovey received therefor $500.00 *"demanded* by Hovey *for his services* rendered as trustee and agent" for *Heath and Knapp.*

There is no finding that Heath and Knapp had knowledge of said conveyances, or that they had participated

or acquiesced in said transaction, or that they were guilty of fraud in connection therewith.

Nor is there a finding that said secret agreement related *to the Glendale property;* nor is there a finding that there was an agreement that the proceeds received upon the re-sale of the Glendale property should be applied as a payment on the judgment.

And there is no finding that Heath and Knapp were guilty of fraud in connection with the acquisition of either the Glendale property, or of the Virginia Avenue property at the aforesaid Sheriff's sales.

The *conclusion* of fraud is contained only in Finding VI [R. p. 61] *and same is only against Woodd and relates solely* to the Virginia Avenue property. The finding recites *in general language* that *she* (Woodd) was guilty of fraud in that she planned to conceal the Virginia Avenue property from the bankrupt's trustee.

On said *conclusion,* Heath and Knapp were divested of their title to the Virginia Avenue property.

Objections to said findings were filed by Heath and Knapp on the grounds (among others): (a) that the findings were not sustained by the evidence; (b) that the evidence was undisputed that there was no secret agreement; (c) that moreover the judgment was at no time paid; (d) that said findings imputed dishonorable acts to Heath *"now deceased"* and to Knapp "both of whom have been *judicially* exonerated" (*Douillard v. Smith, supra*). Said objections were not passed upon by the Referee.

VI.

Order of District Judge.

On review [R. p. 83], the Referee's findings were incorporated in the order of the District Judge by reference, and no other findings were made. The Referee's Memorandum Opinion was not incorporated therein. The Referee's order was affirmed without an opinion on December 1, 1947, and judgment thereon was entered December 2, 1947.

VII.

Issues.

In light of said Findings, the issues are but few and simple. They are:

1. Is there any evidence to support the Referee's Finding that the judgment was paid?

2. If the judgment was in fact paid, when was it paid? Was it paid *before* or *after* April 18, 1944, when the Sheriff's deed became absolute and Heath and Knapp became the unconditional owners of the Virginia Avenue property?

3. If the judgment was in fact paid, was it paid *before the filing of the petition in bankruptcy?*

4. If the judgment was in fact paid, is there any evidence in the record to support the Referee's Finding that it was paid *pursuant to an agreement,* secret or otherwise, not to reconvey the property to Woodd "until she should secure her discharge in bankruptcy and the estate should be closed"?

5. If such an agreement was made, was it made *before* or *after* April 18, 1944, when their title to the Virginia Avenue property became absolute?

6. If such an agreement was made *after* April 18, 1944, was the agreement in writing and enforceable under the Statute of Frauds?

7. Was the court warranted, under all of the circumstances in this case, in concluding that the property in question belonged to the bankruptcy estate of Woodd?

These are the only issues which are presented by the Referee's Findings, insofar as Heath and Knapp are concerned.

As the issue bearing on the validity of the Heath and Knapp judgment and of the Sheriff's sales thereunder of either the Virginia Avenue property or of the Glendale property was eliminated by the Referee's Findings, a recital of the facts on this issue would be superfluous and irrelevant.

However, if this court is interested in this issue, may we respectfully suggest to the court to read *the Douillard v. Smith* case in 70 Cal. App. 2d 522, wherein the facts in support of the validity of said judgment and of the Sheriff's sale of the Glendale property are comprehensively stated.

Assuming *arguendo* that the Referee's Findings herein are specific and are in compliance with Rule 52 of the Rules of Civil Procedure, the evidence on the above aforesaid stated relevant key issues clearly establish the following facts, and same are based not on a speculation and conjecture, but on competent and sworn testimony:

A.

The Heath and Knapp Judgment Was Not Paid at Any Time.

The following tabulation of the amounts collected on said judgment is established by the exhibits attached to the corrected Record, namely: Sheriff's Collection Return, dated Sept. 10, 1941; Sheriff's Collection Return, dated April 16, 1943; Return on Execution, dated April 12, 1943; Return on Execution, dated September 8, 1943:

Hovey v. Wood No. 450821 Superior Court.

Judgment $4000.00	
20.25	Cost bill.
$4020.25	Entered July 8, 1941.
48.46	Int. at 7% from July 8, 1941 to Sept. 10, 1941.
$4068.71	
430.48	Net amount applied from attachment in Condemnation case *L. A. v. Winter* No. 444092 Superior Ct. on Sept. 10, 1941 after deduction of Sheriff's fees.
$3638.23	Amount unsatisfied on Sept. 10, 1941.
253.23	Interest from Sept. 10, 1941, to Sept. 8, 1942.
3891.46	
1200.60	Net amount applied from Sheriff's sale of *Glendale property,* Sept. 8, 1942.
2690.86	

111.99	Interest from Sept. 8, 1942 to April 12, 1943.
2802.85	
1746.05	Net amount from Sheriff's sale of *Virginia Avenue property* April 12, 1943.
1056.80	
.82	Interest from April 12, 1943 to April 16, 1943.
1057.62	
9.90	Collected as rent from Mrs. G. Yarborough and applied on Judgment April 16, 1943.
$1047.72	Balance due.

(It should be noted that said net balance of $1047.72 on April 16, 1943, as established by the Sheriff's official records, was arrived at *after crediting* the judgment with $1200.60 (*paid by Heath and Knapp for the Glendale property*) and with the further sum of $1746.05 (*paid by Heath and Knapp for the Virginia Avenue property.*) Please note further that the aforesaid net balance of $1047.92 is in substantial accord with Heath's statement in his will *of April 22, 1943,* wherein he estimated that the balance then was *about $1000.00.* [R. pp. 115-116.]

It is respectfully submitted that the characterization of this will in the Referee's Memorandum Opinion as being "a hidden secret revealed by a dead man's will" [R. p. 39], and the further statement therein [R. p. 54] that this revelation constituted clear evidence of payment of the judgment *before the filing of the bankruptcy petition,*

and that by reason of said payment the Virginia Avenue property became an asset of the bankruptcy estate at the inception of the bankruptcy are clearly erroneous.

Passing for the time being that the Referee's finding [R. p. 60] that the judgment was paid is but a conclusion, and not a specific finding of an ultimate fact, and assuming *arguendo* that the Referee's Memorandum Opinion may be accepted as a substitute in place of his "Findings," it is respectfully submitted that the alleged itemized payments recited in said Memorandum Opinion [R. p. 43] did not and could not be applied as payment on the judgment.

1. *$500.00 payment to Hovey September 11, 1946.* This was made *after* the bankruptcy (Bankruptcy petition was filed August 29, 1945); it was not paid to Heath and Knapp, and, as hereinafter pointed out, same was received by Hovey without Heath and Knapp's knowledge and consent and in fraud of their rights.

2. *Payment to Knapp of $1600.00.* This was made in *January of 1946 (after the bankruptcy),* and it was received on the *re-sale of the Glendale property,* which on this record was Heath's and Knapp's own property. [R. pp. 393, 335, 336.]

3. *Payment to Hovey of $1200.00.* This was likewise received *after* the bankruptcy, on the re-sale of the *Glendale property,* and as hereinafter pointed out, it was, moreover, wrongfully withheld by Hovey from the Heath estate.

4. *Payments to Hovey from mortgage increase.* This money was used as a cash stay bond on the appeal involving the so-called Yarborough note [R. p. 167-434] in the

case of *Puissegur v. Yarborough* reported in 29 Cal. 2d 409 in which Puissegur (one of the creditors herein) prevailed; that upon the affirmance of said appeal in his favor, the moneys were repaid to Puissegur [R. p. 168] and the only money received by Heath and Knapp in this transaction was $9.90 which was duly credited on the judgment on April 16, 1943. (See Sheriff's Return on Execution.)

The evidence in the record is undisputed that said balance of $1047.72 was at no time paid, either *before* or after the bankruptcy.

B.

There Was No Agreement, Secret or Otherwise, to Reconvey the Virginia Avenue Property to Woodd.

Assuming that the judgment was in fact paid, it was not paid *before* the bankruptcy, and moreover, there was no agreement as found by the Referee.

The only arrangement between Woodd and Heath and Knapp, as established by the record, was that Woodd was to act as caretaker, that she was authorized to collect the rents for Heath and Knapp and in consideration thereof she was to have the use of one flat, rent free.

The only witnesses on this issue were Knapp, in his own behalf (Heath being dead), and Woodd and Hovey, witnesses for the trustee.

Knapp's testimony appears on pages 323, 330 and 428 of Record.

> "A. She was to collect the rents and as remuneration (90) for collecting the rent she was to receive an apartment." [R. p. 323.]

"A. I cannot tell you but my understanding from Mrs. Knapp was that she paid out practically every bit of the rent on mortgages and interest." [R. p. 330.]

"A. No, the only thing, the only conversation relative to that, and I don't know when it was, was to the effect that the moneys received from the rentals were to be used to pay off an encumbrance and Mrs. Woodd was to have the use of an apartment for the purpose or rather in consideration of collecting the rent and keeping the place up." [R. p. 428.]

Woodd's testimony (a witness for the trustee):

"Q. Dr. Hovey took the property and kept it? A. Yes, sir.

Q. You didn't have any agreement with him to get it back? A. No, sir.

Q. Or collect the rents or anything? A. Yes, I was collecting the rents on Virginia Avenue.

Q. Why? A. Because they allowed me to live there. I had no place to go." [R. p. 134.]

She further testified that she remitted the rents to Hovey, that Hovey paid the taxes and made the payments on the mortgage, that the arrangement was made after the sale of the Virginia Avenue property [R. pp. 134, 144, 244, 451); that she had no interest in the property after it was sold by the Sheriff [R. p. 185]; that after the sale she was the "caretaker or agent" [R. pp. 272, 245]; that upon the Sheriff's sale of the Virginia Avenue property (April 12, 1943) the judgment against her was credited then with $1775.00 [R. p. 273]; and prior to the sale she was paid her homestead exemptions. [R. pp.

331, 450.] (See also Amended Record, Order of Court and her receipt.)

Being under the impression, however, that Heath's will under date of April 22, 1943 [R. pp. 115-116], was a "hidden secret revealed by a dead man's will" [R. p. 39] (this in face of the fact that it was in full accord with the Sheriff's official record), the Referee thereupon proceeded to interrogate Woodd *as to her interpretation of Heath's will* and along the lines, as indicated by the following colloquy:

> "Q. Now, when Mr. Heath wrote his will, the will that they are now probating, apparently in court, it says: 'Mrs. Woodd owed me about $1000.00 represented in the Hovey versus Woodd judgment.' Now, that was on April 22, 1943; after that date has he received his $1,000.00? A. No, he has not.
>
> Q. *What did he mean;* what did you owe him on April 22 (247) 1943? A. I don't know, I owed him money long before that; I had divorce cases and things like that and the Douillards gave me so much trouble all through the years." [R. p. 451.]

> "Q. Was there an understanding that when, say as of April 22nd, 1943, that is when Mr. Heath made the statement, wrote it out in his own handwriting, was there an understanding that if and when he received for his part of this Hovey judgment another $1,000.00, that that would satisfy him? A. I don't remember anything like that.
>
> Q. What is now your *explanation* as to his statement of April the 22nd, 1943, that you owed him about $1,000.00 represented in the Woodd versus Hovey judgment? A. I would not know.
>
> Q. Now, you heard Mr. Knapp state his claim to this property. Do you consider that he has been paid? (248) A. Mr. Knapp has been paid?

Q. Yes. A. *No, I don't feel that he has been paid.*

Q. How much does Mr. Knapp, in your opinion, still have coming? A. I would say more like $1,000.00 to Mr. Knapp. He fought all through this thing; Mr. Heath was sick a great deal.

Q. In other words, if you owed anything to anyone, you would say $1,000.00 to Mr. Knapp and not to Mr. Heath? A. Yes, I would say that." [R. p. 452.]

"Q. But he contends he should have all of it. A. Yes, I know he does.

Q. That is what he contends. (249) A. Yes, I know.

Q. And you dispute that contention, that he should not have anything more than $1,000.00, is that it? A. Yes, sir.

Q. It was bought by your nephew and he gave it to you after he bought it? A. Yes, sir.

Q. So you can claim it is yours? A. Yes, sir, *and I don't want to let go of it.*" [R. p. 453.]

"Q. By the Referee: Well, now what about this —if you think Mr. Knapp would have another $1,000.00 coming, then if that is the case there is something that still should be paid to him, even under your theory, or did he get the $500.00 from Mr. Hovey? A. I don't know that.

Q. How is Mr. Knapp going to get his money if he should have another $1,000.00, if he has not been paid to that extent, how is he going to get his $1,000.00? A. I don't know." [R. p. 455.]

"Q. How is he to be paid? A. Well, I would have to borrow some money somewhere to pay it." [R. p. 456.]

Hovey's testimony (a witness for the trustee):

He testified that the rents were remitted to Mrs. Knapp until Heath's "recent illness," and that thereafter they were remitted to him [R. p. 200]; and that the arrangement was that Woodd was to collect and remit the rents, and that she was to have one flat, rent free [R. p. 201]; *that there was no arrangement to return the property to her* [R. p. 202]; and that Woodd was paid for her homestead exemptions before the sale [R. pp. 207, 209, 210]; and that upon the sale of the property he took over the management. [R. p. 216.] See his further testimony along the same lines on Record pages 150, 375, 376, 377, 512.

He further testified that he was instructed to collect the rents [R. p. 513]; that he paid the taxes [R. p. 512]; that the net monthly rental was $35.00, and that the monthly payments on the mortgage were in like amounts [R. p. 513], and

"Q. Did you ever have a conversation with Mr. Heath or Mr. Knapp or Mrs. Woodd regarding the keeping of the property out of Mrs. Woodd's name until the litigation was disposed of? (42) A. *No, I never have.*" [R. p. 157.]

C.

The Referee's Conclusion of Fraud [Finding VI, p. 61] Is Confined to Woodd.

As previously pointed out, the Referee's Finding is that the $500.00 paid to Hovey because he *"demanded"* it, that same was paid to him in behalf of Woodd "for *his services* rendered as trustee and agent for Fred W. Heath and respondent Daniel A. Knapp,"

There is no finding that this was done with Heath's and Knapp's knowledge and consent, or that they had acquiesced therein.

D.

Facts in Connection With Placing of Title in Woodd After Her Discharge.

The facts hereinafter recited clearly show that Heath and Knapp had no knowledge of this transaction, *and that same was in fraud of their legal rights.*

Knapp's testimony was that it was not until *December, 1946* (at one of the hearings before the Referee) that he had obtained the information that Hovey had previously caused the title to be transferred to Woodd [R. pp. 337, 342, 427, 428] and

> "The Witness: *The property was being held for the rental and awaiting a market.* It was run-down. the house was in bad shape; the trees were falling around about it and unless someone wanted that property badly we were afraid we could not get what would be desired. Dr. Hovey and I have talked about that situation a number of times. Then came the message day before yesterday that he had sold the property, and if I remember correctly, to Louis

Douillard, and that Louis Douillard had sold it to Mrs. Woodd.

Yesterday I went out to Mrs. Woodd's to verify (119) that fact and find out how in the world it all came about and I took Dr. Hovey with me there. And I was simply amazed and astounded to find that any such proceeding as that took place; because Dr. Hovey had testified all the way through that he was holding the property for Mr. Knapp and Mr. Heath and had no interest in it whatsoever." [R. p. 345.]

"Q. By the Referee: What explanation did he give you, Mr. Knapp, when you confronted him with the facts? A. Well, he said he thought, as near as I could get it, that he was selling the trustee's interest. He told Mr. Douillard he was unable to attend to the renting and to the property and he thought a younger man should take over his duties; and I asked him how it happened he took $500, and his only explanation to me was that he needed the money and he said also at that time that his legs and hips were swelling and he was in a terrible condition physically and mentally and wanted to get out of the picture.

Q. At that time was he holding the property for you and Mr. Heath or just for you? A. He was holding the property for me and for the estate of Mr. Heath." [R. p. 346.]

He further testified that Hovey had no interest in the property, but that Hovey told him at one time that Heath was indebted to him for moneys loaned to him in his lifetime [R. p. 322, 415]; that, however, Hovey has retained about $1200.00 out of the moneys belonging to the Heath estate upon the sale of the Glendale property with-

out filing a claim therefor in the Probate Court [R. pp. 419, 423]; that Hovey refused to pay the money back to the estate because he claimed that Heath had owed him that money. [R. pp. 423, 424.]

Hovey (a witness for the trustee), testified that he had known Heath for many years [R. pp. 196, 198]; that at the time of his death, Heath owed him $1200.00 and he therefore felt that he was entitled to an equity in the property to that extent [R. pp. 211, 212]; that he considered, however, that this $1200.00 debt had been repaid when he retained this sum upon the re-sale of the Glendale property, but that Heath owed him other money.

> "A. He still owed me *some legal fees* for the frequent trips I have made from my office, like this venture, where I have to be away, and that was to come in as part of the expense account of this suit —the $1000.00." [R. p. 214.]

> "Q. For those services, then, in connection with this litigation, you were to get $1200 and the property was then more or less held by you as security for the payment of that? A. That is right." [R. p. 215.]

Elsewhere, however, he testified, that the $1200.00 due him from Heath at the time of his death was for a *loan* made to him in connection with the sale of a farm in Nevada. [R. p. 222.]

He admitted that Knapp had no knowledge of their dealings. [R. p. 221.]

He testified:

"Q. You testified the other day you were going to get it out of this property. A. That is right; I want it." [R. p. 152.]

When asked by the Referee why he had not consulted Knapp before he sold the property to Woodd's nephew for $500.00, his testimony was:

"Q. And yet you went out and sold this property without consulting Mr. Knapp? A. Yes, I did.

Q. Why did you? A. I have no idea.

Q. By the Referee: Was it to defraud him out of any money? A. Oh, no.

Q. Did you give him the $500? A. No, I didn't." [R. p. 366.]

"The Referee: It looks as though you got whatever you got your hands on in this deal. Let's go into this a little further.

Q. By Mr. Bowden: Have you still got the money you received out of the Glendale property? A. No.

Q. What did you do with it? A. I used it in my living and in my business.

Q. How did you regard it or record it on your books of account? A. Why, it is just the amount that was due to me from Mr. Heath.

Q. What was that? A. That was for the sum of money he had owed me for a number of years.

Q. How long? A. I believe he owed me that about 12 years. (146)

Q. By the Referee: That paid your account, did it, and balanced you up with him? A. The 1200 did, yes sir.

Q. By Mr. Bowden: What portion of the money was allowed to the fees or expenses in the suit of Hovey vs. Woodd? A. I don't know. Is that the $1200, the fee?

Mr. Bowden: I don't know. I am asking you. A. I don't know." [R. p. 367.]

He further testified that he had not advised either the Heath estate, or Knapp about the proposed sale to Woodd's nephew [R. p. 370] *and admitted* that he was later reprimanded by Knapp. [R. p. 371.]

And the reason assigned by Hovey for his actions was that he was in a bad mental and physical condition, and that he thought he was entitled to some money for his services and his mental distress [R. p. 374] and

> "I had somewhat had a physical breakdown in August and did a lot of things that was rather astounding to find myself doing mentally, and I was very anxious to get the responsibility of everything off my shoulders that I could, with the sole exception of my own work, which was burdensome enough." [R. p. 381.]

Mrs. Woodd, who was a witness for the trustee, testified that she was told by Knapp at one time that he had the intention of selling the Virginia Avenue property [R. p. 235]; that *she became thereupon frightened and sick,* as she did not know "where I would move to" [R.

p. 236] and that she might be evicted [R. p. 463]; that she told her nephew that Knapp threatened to sell the property [R. p. 247]; that her nephew thereupon went to Hovey (why he didn't go to Knapp, she did not know) [R. p. 247]; that, while, admitting the judgment against her had not been paid as yet, she felt, however, that she was not indebted to Heath because he had owed her some other money in connection with another deal relating to another piece of property [R. p. 459]; that she was advised by counsel that she could buy property or take gifts after she was discharged [R. p. 470]; and, when asked by the Referee why she did not see Knapp about it, her testimony *was that her nephew took it upon himself.* [R. p. 472.]

Woodd's nephew, L. A. Douillard, also a witness for the trustee, testified that he went to see Hovey as he figured that he could get the property, and also that he may have discussed it with Woodd [R. p. 351]; that Hovey did not tell him that it was Heath and Knapp's property [R. p. 352]; that he paid his own money [R. p. 355]; and that he lived with Woodd in the same house [R. p. 355] but that he did not know about her bankruptcy [R. p. 352], and "I figured something happened to me I would like for her to have it" [R. p. 354]; that Woodd did not pay him any money that "I just gave it to her" [R. p. 355]; that he did not know that Heath and Knapp had represented his aunt [R. p. 475], but that Heath's name was mentioned [R. p. 476]; that Woodd did not tell him that the judgment against her has been

paid [R. p. 476], and that he did not have a conversation with his aunt before he went to see Hovey [R. pp. 476, 479]; that he did not know that Knapp had an interest in the property [R. p. 483] *and that the deal was made as soon as Hovey told him that he wanted $500.00.* [R. p. 484.]

The testimony of these witnesses, we submit, gives the true picture of the transaction in connection with the placing of the title in Woodd's name after her discharge. While the testimony *of the trustee's witnesses* (Woodd, Hovey and Douillard) was not confidence inspiring and "was so inconsistent and contradictory as to cause the Referee to doubt even their simplest declarations" [Referee's Certificate R. pp. 22-23], Knapp's testimony, on the other hand, was straightforward, consistent and realistic, and was not characterized as incredible either in the Referee's Certificate [R. pp. 22-23], or in his Findings. [R. p. 61.]

The fraud conclusion in the Findings [Finding No. VI, R. p. 61] is directed solely against Woodd.

It is crystal clear from the evidence that the placing of the title in Woodd's name after her discharge was engineered by Hovey and Woodd (through the instrumentality of Douillard) for the sole purpose of enabling Hovey to obtain the further sum of $500 (in addition to the $1200.00 heretofore misappropriated by him upon the sale of the Glendale property) and also to enable Woodd to have a place to live in, and to prevent her eviction from the Virginia Avenue property after she was told by Knapp that he might sell it in the open market.

Argument.

We respectfully submit that the Order and Judgment we are appealing from is clearly erroneous, and is not justified on any ground, theory, or hypothesis; that the evidence supports neither the findings of the court, nor the order decreeing the property to be that of the bankruptcy estate of Woodd.

It goes without saying that Mr. Knapp should not have acted as his own trial counsel in the court below. The record fairly shows that he was under a mental strain throughout the numerous hearings before the Referee as he was sincerely convinced that the instant action against him and against his dead associate was but a continuation of the smearing campaign and persecution which first originated in the *Douillard v. Smith* litigation. [See Objections to Findings, R. p. 55 reading]:

> ". . . that said finding is scandalous and imputes dishonorable acts to an honorable member of the State Bar of California now deceased, and to Daniel A. Knapp also such a member, both of whom have been judicially exonerated as to said acts and conduct."

And also his comment at the conclusion of proofs, reading in part:

> "As regards this conspiracy—there is not one iota of conspiracy on the part of Mr. Knapp in connection with it. On the contrary, the entire evidence is contrary to anything of that sort. This thing has been reduced to transcript after transcript and adjudicated on this point, both in the Superior Court and the Appellate Court and finally in the Supreme Court of the State of California; (331) and out of anything that ever happened to any individual, the party who is opposed to him can always bring in the idea of conspiracy or something of that kind, but there is no conspiracy in this case," [R. pp. 519-520.]

> "Possibly this is too much of a personal effort to prove as far as I am concerned *and I hope the Court will excuse me, but I am a lawyer, and, your Honor, it hurts.*" [R. p. 520.] (Emphasis ours.)

It is logical to assume that, being in that condition, Knapp was not and could not be in a state of mind to make an adequate argument in the court below.

But, regardless of the above, all of the evidence shows rather plainly that the property in question belonged to Knapp and Heath pursuant to proper court proceeding, Sheriff's sales and deeds properly executed and recorded.

The fact that Hovey as trustee for Knapp and Heath wrongfully conveyed this property to Douillard for a wholly inadequate consideration without the knowledge or consent of Heath or Knapp does not strengthen the position of the trustee in bankruptcy; nor does the fact that Douillard endeavored to give this property to the bankrupt after her discharge in bankruptcy establish a secret agreement such as mentioned and referred to in the findings or show Knapp and Heath to be a party to such conspiracy—wrongful, fraudulent or otherwise. The trustee's only claim of a conspiracy or secret agreement to withhold this property from the bankrupt estate until after Woodd had been granted a discharge in bankruptcy rests in the suspicion and inference to be drawn from the acts and conduct of Hovey in his wrongful and unauthorized transfer of this property.

If Hovey had stolen personal property belonging to Knapp and Heath and given it to the bankrupt, we do not believe the trustee would have contended that such property was an asset of the bankruptcy estate. What Hovey actually did do with respect to this real property can scarcely be distinguished in principle from a theft or misappropriation.

Summary of Argument.

I.

Referee's Findings Are Not Specific and Do Not Comply With Rule 52 of the Rules of Civil Procedure.

We shall refrain from citing the numerous decisions in which Rule 52 is construed. We deem it sufficient to cite two of the most recent decisions construing the meaning of this rule.

The recent case of *Cafritz v. Koslow,* 167 F. 2d 749, involved a loan transaction and the defense was that plaintiff's debt was barred by the Statute of Limitations. The findings of the court therein complained of were:

> "1. That the indebtedness, recovery of which is sought here, had long been barred by the statute of limitations.
>
> 2. That there was no new contract or agreement, supported by consideration, which would revive the old indebtedness and remove the bar of the statute of limitations."

The judgment was reversed with directions to make more explicit findings of fact. The court stated:

> "The findings of fact should be made more explicit with regard to the existence of the new oral contract allegedly created, and continuing within the period of limitation prior to the filing of this suit, as well as to the indebtedness which may have been incurred by appellee pursuant to that contract."

In the case of *Smith v. Dental Products Co.,* 168 F. 2d 516, the court, after citing numerous cases, including Supreme Court decisions, says:

> " 'These are * * * mandatory provisions which should be respected; they are not meaningless words';

> 'findings of fact on every material issue are a statutory requirement,' (158 F. 2d 141.) 'There must be such subsidiary findings of fact as will support the ultimate conclusion reached by the court.' "

We wish to here point out that the Referee's Findings are not in compliance with the mandatory provisions of this rule in the following respects:

FINDING IV. [R. p. 59.] This finding says in part:

> "That thereafter plaintiff in action number 435718 brought an action against respondent M. L. Hovey to set aside said judgment and was unsuccessful in said action."

This finding is incomplete and does not clearly state the facts in that this action was not only brought against Hovey but was also against appellants here, Knapp and Heath, and it also involved the validity of the sale by the Sheriff of the Glendale property. Such a finding of fact is material to the issues herein as bearing upon appellants' claim that the Glendale property was their own and they were entitled to the proceeds upon its re-sale. The re-sale price which Knapp and Heath received for this property some considerable time after the Sheriff had deeded the same to them could by no stretch of the imagination be considered as a payment to them upon the judgment. The judgment had previously been credited with the amount bid at the time of the Sheriff's sale.

That the Referee was laboring under a false impression with respect to this question is plainly seen in his memorandum opinion [R. p. 43] where he considered the amount received by Knapp and Heath upon a re-sale of this property, long after the Sheriff's sale, as a payment upon the judgment rendered rather than the amount bid at the Sheriff's sale.

"The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws."

Civ. Code, Sec. 679.

See, also:

Estate of Pierce, 28 Cal. App. 2d 8;

Burris v. Rodriguez, 22 Cal. App. 645-647.

FINDING V. [R. p. 59.] This finding in part provides:

"That some time after the Sheriff's sale, and prior to the filing of the voluntary petition herein, a secret agreement was entered into between Fred W. Heath and respondent Daniel A. Knapp and M. L. Hovey on the one side, and the bankrupt on the other, to the effect that the said real property above described purchased at the Sheriff's sale in the name of respondent M. L. Hovey, was (61) to be held by said M. L. Hovey until attorneys' fees in an agreed amount was paid by the bankrupt, at which time the said real property above described was to be returned to the bankrupt, and in the meantime said bankrupt was to have the use and control of said property. That the agreed attorneys' fees were thereafter and before the filing of the voluntary petition herein, paid by the bankrupt and received by said Fred W. Heath and respondent Daniel A. Knapp, through respondent M. L. Hovey as their agent in said action number 450821 above described.

That at the time of the filing of the bankruptcy proceedings herein, all of said agreed attorneys' fees had been paid. That it was further agreed between the said respondents herein and the bankrupt that

the real property should not be reconveyed to the bankrupt until she should secure her discharge in bankruptcy and this estate should be closed."

This finding not only violates Rule 52 hereinabove referred to but it is in defiance of the Statute of Frauds, Section 1624 of the Civil Code, subdivisions 1 and 4. We wish to emphasize the fact that the effect of this finding is, that upon some day over a period of approximately two and one-half years, this "secret agreement" was entered into and according to the latter portion of said above quoted finding, the agreement was not to be fully complied with until after the bankrupt had been given her discharge in bankruptcy which, according to this finding, was on or about the 10th day of September, 1946.

It is likewise important that we keep in mind the fact that the sheriff's deed to this property was given to M. L. Hovey as trustee for Knapp and Heath more than one year before said bankruptcy proceeding was ever filed. Then, how could this have been "an agreement that by its terms is not to be performed within a year from the making thereof" as provided in subdivision 1, Section 1624, Civil Code, and this finding does not state that such an agreement was in writing. Had it been in writing, it would not have been so difficult to have pointed to the exact date.

According to this finding, this agreement could well have been entered into, if in fact such an agreement exists, after the sheriff had deeded the property as above

referred to, and if an oral agreement was entered into after the sheriff's deed, then subdivision 4, Section 1624, Civil Code would apply and such an agreement would be invalid under the Statute of Frauds.

We respectfully urge that if a court can properly make a finding such as here complained of and find that a "secret agreement" was entered into sometime within approximately two and one-half years, the court could just as easily extend the time to five or ten years. We further urge that the very fact that the court was unable to fix the exact time or the approximate exact time that this "secret agreement" was entered into is tantamount to an admission that this finding is based solely upon suspicion, and the fact that it was based upon suspicion, and suspicion alone, is clearly shown from the evidence herein referred to. Both the quoted and unquoted portions of this finding are not only unsupported by the evidence, but have other glaring defects which we do not deem necessary at this time to comment upon. The defects therein will be quite obvious to the court upon a reading of said finding.

The finding in many respects is nothing more or less than a conclusion and is not a finding of ultimate fact. This finding further states:

> "That the agreed attorneys' fees were thereafter and before the filing of the voluntary petition herein, paid by the bankrupt and received by said Fred W. Heath and respondent Daniel A. Knapp through M. L. Hovey . . ." [R. p. 60.]

This finding is in direct conflict with the evidence and is in direct conflict with the reasoning of the Referee in his memorandum opinion. [R. p. 43.] The Referee there figured the $500.00 paid to Hovey on September 11, 1946, as part of the money which covers the payment of the judgment and this $500.00 was not paid until long after the filing of the bankruptcy proceeding herein. The other evidence which we have cited in this brief also discloses that the full judgment was never satisfied but there is a balance still owing thereon slightly in excess of $1,000.00 and there is not a word of evidence showing that M. L. Hovey ever paid this $500.00 above mentioned to Heath or Knapp.

This finding further fails to state how and when this judgment was paid to Heath and Knapp.

FINDING VI. [R. p. 61.]

A reading of this finding will disclose that it is neither in compliance with Rule 52 nor supported by the evidence. The statement in the finding that "the said real property was at the date of the bankruptcy proceedings an asset of the bankrupt estate . . ." is nothing more than a conclusion of law without any support of facts.

For the reasons heretofore given in this brief, conceding without admitting that the secret agreement set forth in Finding V actually existed, the record is plain that this property was deeded to Hovey as trustee for Knapp and Heath more than one year prior to the filing of the

bankruptcy proceeding and as we have heretofore pointed out, such an agreement would have been invalid under the Statute of frauds unless it was in writing.

Finding VI [R. p. 61] further states:

> "That during the prior administration of the said bankrupt estate, the said facts hereinabove referred to with respect to the plan to conceal the said real property from the bankrupt's Trustee, were not discovered and that the concealment having been discovered after the discharge was granted, the creditors caused the estate to be reopened . . ."

This finding speaks of a "plan to conceal said property" . . . "herein above referred to . . ." Just what plan to conceal the property hereinabove referred to the finding has reference to, we do not know because there is no plan to conceal above referred to in the findings and there is no finding which states directly or indirectly that the appellants herein were involved in any plan to conceal said real property from the bankruptcy estate, nor is there any evidence in the record to justify a finding that Knapp and Heath were involved "in a plan to conceal said property from the trustee . . ."

II.

There Is No Evidence to Support the Referee's Finding That Heath's and Knapp's Judgment Was Paid Before Bankruptcy. On the Other Hand, the Record Shows That This Was Not Paid at Any Time.

What has heretofore been said with respect to the payment of this judgment fully covers this point without the necessity of further comment.

III.

There Is No Evidence to Support the Referee's Finding That There Was a Secret Agreement to Reconvey the Property to Woodd After Her Discharge. On the Other Hand the Record Shows Clearly the Absence of Any Agreement, Secret or Otherwise, Valid Under the Statute of Frauds or Otherwise.

Likewise, what we have heretofore said upon this question in commenting upon this finding fully covers this point.

IV.

If the Language Referring to "Secret Agreement" in Finding V [R. pp. 59-60] Implies Fraud, There Is No Evidence in the Record to Support Said Finding. On the Other Hand, the Evidence Negatives Any Evidence of Fraud Upon Behalf of Knapp and Heath.

Fraud cannot be supported by mere suspicion or suspicious circumstances.

> "Whether a particular inference can be drawn from certain evidence is a question of law."
>
> *Blank v. Coffin,* 20 Cal. 2d 457;
>
> *Kosloskye v. Cis,* 70 Cal. App. 2d 174.

In 10 Cal. Jur., page 740, paragraph 61, the law on inferences is summarized as follows:

> "Inferences, however, are not of sufficient force to raise a conflict. They may be defeated by proper evidence, *and clearly cannot prevail against a proved fact to the contrary.*" (Emphasis ours.)

This text was approved of in *Blank v. Coffin,* 20 Cal. 2d 457.

In *Giannini v. Southern Pac. Co.,* 98 Cal. App. 126, the Court said at page 136:

> "While all reasonable inferences are to be drawn from the evidence in favor of the conclusion of the jury and conflicts are to be resolved in favor of respondents, *inferences cannot be drawn contrary to uncontradicted testimony and based upon imagination, speculation or supposition.* The jury cannot shut its ears to the only testimony on the question and set up a standard of its own." (Emphasis ours.)

In the leading cause of *Maupin v. Solomon,* 41 Cal. App. 323 (approved by the Supreme Court), the second syllabus reads:

> "Such inferences are allowed to stand not against the facts they represent, but only in lieu of proof of such facts, *and where the facts are proven to be contrary thereto,* no conflict arises and a finding of the jury in accordance with such inference cannot be supported thereby." (Emphasis ours.)

In *Dull v. Atchison, T. & S. F. Ry. Co.,* 27 Cal. App. 2d 473, the Court said that inferences cannot be based upon imagination, speculation or supposition.

In *Lyders v. Wilsey,* 94 Cal. App. 493, the Court said on page 496:

> *"The first ground is that the two respondents conspired to defraud him out of his right to purchase the land and that we should find this to be true by disregarding all the sworn testimony* upon which the trial court found the facts and by taking in lieu of that evidence the suspicions which the appellant entertains regarding the conduct of the respondents. Though it should be sufficient to say that this court will not set its judgment above that of the trial court upon the simple question of the facts in issue where the finding of fact depends upon the truth of the testimony of the witnesses appearing before the trial court, there is another answer to the argument of appellant and it is this: *his only claim of a conspiracy rests in the suspicions and in the inferences which he insists must be drawn adverse to the positive evidence in the record. But an inference is a deduction to be drawn from the facts proved and not a conclusion based upon suspicion alone."* (Emphasis ours.)

The claimed inference of fraud is answered by the Court in the case of *Podlasky v. Price,* 87 A. C. A. 174, where the Court pointed out that a finding of fraud is too serious a charge to be left to conjecture or surmise; that the presumption is against fraud and is not overcome by shadowy evidence and must be clearly made out.

See also the case of *Douillard v. Smith,* 70 Cal. App. 2d 522, upon this question in which case both Knapp and Heath were defendants, wherein it is said at page 526:

> "In Estate of Ross, 199 Cal. 641, 651 (250 P. 676), the court said: 'It is true that the trial court is the exclusive judge of the weight to be given to

the evidence, but it is also true that the presumption is in favor of honesty and fair dealing (see *Estate of Sweetman, supra,* at p. 28 (185 Cal. 27 (195 P. 918)), and the burden is upon the party asserting the fraud to prove it by some substantial evidence (12 Cal. Jur. 817). The facts and circumstances shown in evidence must have given rise at least to a reasonable inference of fraud and not a mere suspicion thereof. (*Roberts v. Burr,* 135 Cal. 156 (67 P. 46).) Indeed it has been held that "if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of the court or jury to draw the inference favorable to fair dealing." ' "

Conclusion.

In conclusion, we submit that the findings and order of the Referee herein are wholly unsupported by the evidence and the order depriving these appellants of their property cannot be supported either upon the facts or upon the law of the case and that the order and judgment herein appealed from should be reversed.

Respectfully submitted,

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